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Geneva, 25–27 February 2015

Report of the Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead

Held at the Palais des Nations, Geneva, from 25 to 27 February 2015

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Introduction

1. The Expert Meeting on the Transformation of the International Investment Agreement (IIA) Regime: The Path Ahead was held at the Palais des Nations in Geneva, Switzerland from 25 to 27 February 2015. The topic for the expert meeting was decided at the fifty-ninth executive session of the Trade and Development Board on 25 June 2014 and the terms of reference were agreed by the Extended Bureau of the Trade and Development Board in September 2014.

2. Working in breakout and plenary sessions, the experts explored options for Governments for reform of the IIA regime and the investor–State dispute settlement (ISDS) system, sharing experiences and identifying best practices. The meeting brought together over 300 participants, including over 200 experts, policymakers and Geneva-based delegates from 89 member States, 10 international organizations and nine non-governmental organizations, as well as over 100 representatives of other organizations, the private sector and academia.

I. Chair's summary

A. Opening statement

3. The Director of the Division on Investment and Enterprise, in his opening statement on behalf of the Secretary-General, presented the major developments and latest trends in IIAs and ISDS, followed by a discussion of the main challenges currently faced by the IIA regime. The Director also outlined a strategy and process for reform of the IIA regime.

4. The Director emphasized that the current IIA regime was multilayered, multifaceted and highly fragmented. By the end of 2014, the regime had consisted of close to 3 270 investment treaties at the bilateral, regional and plurilateral levels. In 2014, countries had concluded an IIA every other week. Furthermore, at least 53 IIAs, including megaregional agreements, were under negotiation, with the participation of over 100 countries.

5. IIAs had attracted considerable public attention in recent years, particularly related to the negotiations of megaregional agreements. ISDS was among the issues that featured most prominently in the public debate. According to the latest UNCTAD data, the total number of known treaty-based ISDS cases had reached 608 by the end of 2014.

6. The Director noted that the IIA regime was undergoing a period of reflection, review and revision, with reform already being implemented at different levels and towards different directions. Overall, the IIA regime faced the following major challenges: a) striking a balance between granting protection to foreign investors and maintaining policy space for development (including rebalancing the rights and obligations of investors and States); b) integrating sustainable development objectives into IIAs; c) addressing problems with the ISDS system; and d) coping with the systemic complexity and high fragmentation of the regime.

7. In the course of preceding debates, including at the 2014 IIA Conference, held in connection with the World Investment Forum in Geneva in October, many delegates and other stakeholders had expressed the view that IIA reform should be systematic and comprehensive, albeit gradual and properly sequenced. To take the next steps in the process of reforming the IIA regime, more international sharing of experiences and cooperation was called for. In concluding his remarks, the Director noted that UNCTAD, in cooperation

with other stakeholders, including international and regional organizations, could provide a multilateral platform for engagement on these issues.

B. Transformation of the international investment agreement regime
(Agenda item 3)

1. Transformation of the international investment agreement regime

8. In the first plenary session, delegates, as well as stakeholders from the investment and development community, including the private sector, civil society and academia, shared their opinions and experiences of possible ways and means to reform the IIA regime, with a view to fostering the sustainable development dimension of agreements and striking a balance between the protection of investors' rights and a host State's right to regulate in the public interest. Most of the experts highlighted that the different paths towards IIA reform would have implications at the national, regional and international policy levels.

9. Many experts suggested that, given the complexity of the system and the long-term nature of IIAs, a step-by-step approach towards reform was preferable. Some experts emphasized that reform processes should not undermine the role of IIAs in contributing to transparent, stable and predictable regulatory frameworks in host States. Two main issues were highlighted from among the different aspects of IIA reform: modifications and improvements to the substantive provisions contained in IIAs; and modifications and improvements to ISDS procedures.

10. With regard to substantive IIA provisions, the experts stressed the need to promote more clarity in the terms, definitions and concepts used in specific treaty provisions, such as fair and equitable treatment and indirect expropriation. Clearer provisions could help ensure that the interpretations of arbitral tribunals were in line with the intent of contracting parties to an agreement. Other suggestions included general exceptions, temporary safeguard measures in the event of serious balance-of-payments problems, the enhancement of corporate social responsibility and the consideration of human rights impact assessments.

11. The experts discussed the need to reform existing ISDS mechanisms and proposed various options. Several experts suggested addressing concerns related to the transparency of proceedings and independence and impartiality of arbitrators, as well as the issue of predictability and consistency in arbitral decisions. Some delegates shared their national experiences in taking steps to limit investor access to ISDS. The experts considered assessing how much the interests of third parties and local communities affected by investments had been taken into account. Several experts expressed interest in exploring the establishment of an international investment court or an appeals mechanism. Other experts considered that a mechanism for the early dismissal of frivolous claims would be useful.

12. Many delegates provided insights into their national experiences with regard to concluded or ongoing review processes of their model investment agreements. Some of the reviews had included steps to reduce the scope of disputes that might fall under IIAs, with some countries shifting their focus towards greater reliance on domestic remedies. The experts considered possibilities for striking a better balance between investor protection and regulatory space for pursuing public interests. A few experts commended UNCTAD on the guidance provided in the *Investment Policy Framework for Sustainable Development*, considering it particularly useful for revisions to model agreements. One delegate drew attention to national experience in developing an innovative model that focused on investment promotion and facilitation, mitigation of investment risks and dispute prevention, rather than expensive international litigation. Several delegates stressed that the reviews of their model agreements involved a broad range of affected stakeholders.

13. With respect to the expected outcomes of the meeting, some delegates stated that it presented an excellent opportunity to disseminate information, exchange experiences, identify the key benefits and drawbacks of IIAs and undertake a collective effort to search for possible solutions to existing problems. Several experts stressed the role of UNCTAD in informing Governments of developments in the field, providing advice and technical assistance and coordinating individual country efforts in IIA reform. The experts expressed appreciation for the role of UNCTAD as a unique platform for exchange for countries engaged in the process of improving their investment regimes and for backstopping the IIA regime and its reform process.

2. Substantive content of international investment agreements

Scope and definitions

14. The experts devoted particular attention to the definitions of investment and investor, and some experts suggested that these definitions should be carefully circumscribed in IIAs. Different views were expressed on the best ways of doing so and on the assets and activities that should be covered or excluded.

15. Some experts stated that the exclusion of portfolio investment or rights under contracts from the definition of investment would be useful, while other experts considered it important to cover a broad range of investments, including portfolio investment and contract rights. Several delegates suggested that further deliberations on this issue would be helpful. The experts discussed whether requiring investments to be made in accordance with host State laws and regulations would increase or reduce clarity for States and investors.

16. With respect to the definition of investor, concerns were expressed regarding treaty shopping and round tripping by investors. A few experts noted recent treaty practice and suggested the inclusion of additional criteria for covered investors, such as including a requirement to undertake substantive business operations in the home State and regulating the dual nationality of physical investors. Another suggestion was to exclude from treaty coverage investors that had abused rights or to include a denial-of-benefits clause for instances of treaty shopping. In this regard, it would be helpful to clarify at what time States should be able to notify the application of the clause. In addition, the most-favoured nation clause would raise concerns, as it could potentially be used to circumvent and undermine specific scope and definition provisions, by making recourse to more favourable clauses in other agreements. Finally, the experts discussed the implications of extending the scope and definitions of a treaty to the pre-establishment phase.

Fair and equitable treatment

17. The experts examined the fair and equitable treatment clause in IIAs and related concerns. One option considered was to leave such clauses as they existed at present. Several experts emphasized, however, that the formulation of the provision in IIAs was often too general and too vague, giving arbitral tribunals a broad margin for interpretation. Providing more clarifications and guidance on fair and equitable treatment in future treaties would constitute a way forward. In this context, several experts proposed including an exhaustive list of State obligations to clarify the meaning of fair and equitable treatment. A subsequent difficulty, however, would be in ensuring that such a list would be interpreted by tribunals as intended. The inclusion of a negative list to identify what the standard did not include was also suggested.

18. The experts discussed the option of linking the fair and equitable treatment standard to customary international law and the international minimum standard of treatment. While some experts considered this approach useful, other experts noted that this would introduce

additional unclear terms and thus not solve the problem. Another option discussed was replacing fair and equitable treatment with a different term, such as fair administrative treatment, and circumscribing the content of the latter. The possibility of not including a fair and equitable treatment provision in IIAs due to difficulty in defining its meaning was also discussed. Another option suggested was to include fair and equitable treatment as a political commitment (e.g. in the preamble) without its having the force of a legally binding standard.

Indirect expropriation

19. After recalling the four conditions for expropriation that States must comply with under IIAs (public purpose, non-discrimination, due process and payment of compensation), the experts discussed indirect expropriation provisions, drawing on recent treaty practices aimed at defining this concept by adding explanatory language. Although there was a trend to include more detailed definitions of indirect expropriation, some States that had followed this approach had not done so for all of their new treaties, further contributing to inconsistencies in the IIA regime.

20. While it might be considered a beneficial approach, the experts noted that new language might not necessarily be effective and operative in the context of investment dispute settlement. A key challenge in this regard was the improvement of provisions in existing treaties, since renegotiating the large numbers of existing IIAs to insert clarifications on indirect expropriation would be difficult. A possible way forward for States might resemble the opt-in approach of the Convention on Transparency in Treaty-based Investor–State Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL), whereby States might sign on to a general statement clarifying the concept of indirect expropriation and applying it to existing and/or future treaties. This could allow States to amend their entire portfolios of investment treaties at once.

21. The experts examined the relationship between indirect expropriation provisions and the perceived regulatory chilling effect, whereby States might refrain from certain legislation or measures out of concern for potential litigation under IIAs. Different views were expressed on the existence and extent of this effect. Among the issues that might be relevant in this relationship were the available remedies in ISDS proceedings and the calculation of damages by arbitral tribunals.

Pre-establishment

22. The experts discussed the recent trend of a greater use of pre-establishment obligations in IIAs, noting that there were around 100 bilateral investment treaties and 140 "other IIAs" with pre-establishment national treatment.[1] Some countries included pre-establishment national treatment in the investment chapters of their free trade agreements but not in bilateral investment treaties, as investment liberalization might be deemed to be better dealt with in conjunction with trade liberalization. However, there was inconclusive evidence that concluding IIAs with pre-establishment provisions contributed to increased investment flows. This might have been due to the fact that when making pre-establishment commitments, countries often locked in the existing level of openness and did not engage in genuine liberalization. One delegate highlighted national experience in a recent policy shift from post to pre-establishment IIAs, stating that this decision had followed domestic reform

[1] Other IIAs refers to economic agreements other than bilateral investment treaties that include investment-related provisions (e.g. investment chapters in economic partnership agreements and free trade agreements, regional economic integration agreements and framework agreements on economic cooperation).

aimed at greater openness and transparency in the admission and establishment of foreign investors.

23. The experts debated whether pre-establishment obligations could give rise to investor–State disputes, observing that, to date, no ISDS cases of this kind existed. This might be due to several factors, including the relatively small number of IIAs with pre-establishment obligations, the fact that some IIAs excluded pre-establishment obligations from the scope of ISDS, the difficulty of proving damages (especially lost profits) with respect to investment projects that had not even begun and the possible reluctance of investors to force their way into a host State by using ISDS procedures as this might lead to problems in the future.

24. A few experts shared their national experiences with regard to the negative list approach to undertaking pre-establishment national treatment and cited several difficulties, such as the need to undertake an extensive and careful domestic audit of existing non-conforming measures, including at regional and subnational levels of government, and the inability to foresee which new economic sectors might emerge in the future, although it might be possible to carve out new and emerging sectors in a schedule of reservations that formed part of the treaty. Some areas that might require particular attention included land rights, privatization and Government procurement. The positive list approach and best efforts clauses on investment liberalization were also considered, as alternatives to the negative list model. Several other provisions, including the prohibition of performance requirements and a national security exception, might have an important pre-establishment dimension in an IIA.

3. Sustainable development dimension of international investment agreements

Public policy exceptions

25. The experts discussed different types of exceptions, such as those related to balance of payments, national security, taxation policies and prudential measures. The experts highlighted public policy exceptions as an important tool for IIAs, creating a safety net to protect public interests. Such exceptions were available under other bodies of international law, including under the rules of the World Trade Organization (WTO), which allowed States to take certain otherwise prohibited measures under specific circumstances. However, concerns were expressed that the inclusion of such clauses might give greater discretion to States and create uncertainty and the risk of abuse.

26. Several experts noted that there was a need to prevent the abuse of public policy exceptions, including in the form of unjustified discrimination, and to create more certainty for both States and investors on the scope and applicability of such exceptions. The experts noted that exceptions could be formulated in a way that prevented arbitrariness. Exceptions clauses included in the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services of the WTO could serve as a model in this respect. Some experts emphasized the need for procedural mechanisms related to the application of exceptions clauses, such as joint committees of the contracting parties. Finally, the experts discussed whether exceptions should address general policy matters across all sectors or only in specific areas and sectors.

Corporate social responsibility and investor obligations

27. The experts discussed whether and if so how to rebalance the obligations of investors and States in IIAs as, traditionally, investment treaties had included only State obligations and had not elaborated on investor responsibilities. Some experts noted that while rebalancing might be desirable, its achievement would be a challenge and further reflection was required on the possible modalities. In addition, this issue was closely linked

to the intended purpose of a treaty. For example, the aim of a treaty might be to provide protection to all investors or to award such protection only to certain companies, such as those compliant with high corporate social responsibility standards or other similar standards.

28. Different views were expressed on the need to include corporate social responsibility standards and investor obligations and their potential nature (binding versus voluntary) and content. Some delegates suggested that States should set relevant standards for investor conduct in domestic laws, i.e. create a legislative framework with which all investors must comply. Concerns were expressed that foreign investors might be placed at a competitive disadvantage vis-à-vis their national counterparts if they were required to comply with higher standards included in an IIA. Other experts suggested that higher standards for foreign investors were appropriate in exchange for the additional benefits and rights they were granted in IIAs and that for various reasons some States might not be willing or able to incorporate appropriate environmental, health or labour standards into domestic laws. In this context, the experts considered a suggestion that States (as opposed to investors) should make treaty commitments to implement certain minimum international standards in their domestic frameworks. For example, during negotiations for the Multilateral Agreement on Investment, the parties had discussed the possibility of appending the *Guidelines for Multinational Enterprises* of the Organization for Economic Cooperation and Development to the agreement.

29. One method of integrating investor obligations into IIAs, identified by some experts, would be to include them in the definition of investment or in a denial-of-benefits clause, thereby enabling States to bring jurisdictional objections to ISDS claims brought by investors alleged to have violated the respective standards. The experts discussed other options, including taking into account non-fulfilment of investor obligations at the merits and damages stage in ISDS proceedings and allowing a State to raise the issue of investor non-compliance by means of counterclaims. The experts emphasized the importance of drafting clear substantive standards and exceptions clauses. The concept of a social licence to operate was considered, as a way to engage local communities and other stakeholders with regard to investor responsibilities. Many investors had acknowledged the importance of responsible business conduct and, to some extent, arbitral tribunals already took this into account in deciding on investor compliance with national legal obligations. Several experts called for further extensive studies to be made in this field.

Effective rules for promoting sustainable development-friendly investment

30. In discussing the need for more effective rules to promote investments for sustainable development, some experts emphasized the role of domestic law in achieving a sound business climate and stated that IIAs were not the sole or main available tool. The importance of protection clauses in IIAs was highlighted in this regard. In addition, more specific rules on investment promotion in IIAs could be included. Some experts stressed that certain IIA provisions, such as prohibitions on performance requirements, might constrain policy space for promoting sustainable development-friendly investments. With reference to national experiences, the advantages of noting sustainable development goals in treaty preambles were discussed, though such references would have only an interpretative value rather than being legally binding. Finally, the experts discussed a proposal to make investment guarantees or export credits provided by home States conditional on compliance with certain international standards or guidelines.

Investment incentives

31. The experts discussed investment incentives – fiscal, financial or regulatory incentives – in relation to the need to attract investment and preserve policy space at the

same time. A number of views were expressed on whether and how to address incentives in IIAs. Some experts were of the view that incentives were a matter of domestic law, while a few other experts noted that the granting and withdrawal of incentives could potentially become an issue in the context of expropriation and the non-discrimination principle in IIAs. Another view considered was that post-establishment incentives granted only to foreign investors might be perceived as discriminatory vis-à-vis domestic investors. In addition, the experts noted that the applicability of IIA provisions to incentives might depend on whether an agreement was limited to post-establishment or also covered the pre-establishment phase.

32. With regard to sustainable development aspects in particular, a few experts emphasized that decision-making on incentives should be transparent. One suggestion in this respect was to put in place an interministerial committee, publish information online and involve stakeholders. The experts noted that some incentives, for instance tax breaks, might be contrary to sustainable development objectives and should not be used. There was a need to carefully calculate the costs of granting incentives and the expected benefits of doing so. The experts acknowledged that a race to the top in terms of incentives and a race to the bottom with regard to environmental and social standards would be detrimental to sustainable development. Alternative policy options to address this issue were considered, such as restrictions on the use of incentives.

Interrelationship with other bodies of law

33. With regard to the interrelationship between IIAs and other bodies of international law, the experts recognized that there had been a trend to increasingly address in IIAs issues such as human rights, labour, health, the environment and intellectual property, which might be covered by other international instruments. Some IIAs excluded regional integration agreements or double-taxation treaties from the scope of the most-favoured nation clause. Other treaty exclusions concerned compulsory licencing compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO, balance of payments exceptions or peace and security obligations deriving from the application of the Charter of the United Nations. Some experts noted that a potential for conflict between State obligations under other bodies of law and under IIAs could arise, given the interpretive principles applied by arbitral tribunals and past arbitral decisions, although others considered that this potential was limited, since the Vienna Convention on the Law of Treaties provided sufficient guidance in this respect. In this regard, some experts considered, however, that other bodies of law were not always sufficiently taken into consideration in the interpretation of substantive IIA provisions in arbitration.

34. The possibility of listing other treaties in an annex to an IIA was suggested, either with a closed or open-ended list approach. Other suggestions discussed were to create an institutional mechanism to consult on potential conflicts between different instruments of international law among contracting parties and to refer such issues to another body for authoritative interpretation. Many experts considered that the decision-making of arbitrators could be improved through institutionalization of the arbitration system.

4. Tools for modernizing the international investment agreement network

Regional negotiations (consolidation and/or parallelism): free trade agreements versus bilateral investment treaties

35. The experts discussed the implications of increasing regionalism in treaty making. Several dimensions were considered, including whether regionalism could contribute to modernization of the IIA regime, the impact of megaregional treaties on non-participating States and the advantages and disadvantages of having stand-alone investment agreements

versus investment chapters integrated in free trade agreements. In this regard, a concern was expressed that in both multilateral and regional processes, powerful States might impose their wills on smaller or less developed States, given that there might be inequalities even within regions. Regional negotiations could, however, be a means to harmonize the fragmented IIA regime. A proposal was made to grant non-participating States observer status during negotiations. Another proposal was to increase the overall transparency of regional negotiations.

36. While regionalism could contribute to consolidating rules in the long term, a concern in the short term was the use of most-favoured nation clauses that could undermine new treaties with more refined standards. In this regard, the experts noted that it would be helpful for regional agreements to include specific rules on relationships with other existing or future agreements on the same subject matter, for instance by including a conflict-of-law rule determining which law would be applicable in case of incompatibility.

37. With regard to synergies between trade and investment treaties, investment could be considered to be of a specific nature that justified self-standing investment agreements. Since such agreements were signed for both promotion and protection purposes, which might or might not coincide with the goals of trade liberalization, the experts considered it likely that self-standing investment agreements would continue to be concluded.

Multilateral approaches

38. The experts discussed the benefits of multilateral approaches in investment treaty making as a means of achieving greater consolidation of the IIA regime. Most of the experts considered the renegotiation of treaties as the most viable way forward, in light of the limited prospect of reaching multilateral consensus on reform of the IIA regime in the near future. The ability of countries to undertake IIA reform on a purely individual basis was minimal, since the consent of at least two parties would be required for the amendment of a bilateral treaty.

39. The failure of some multilateral attempts related to investment was recalled, but the experts emphasized that multilateral approaches could support reform efforts. Multilateral instruments developed through other international organizations could be a source of inspiration, although the specific nature of the IIA regime could prevent direct implementation. The UNCITRAL Convention on Transparency and its opt-in approach was also recalled. However, the likelihood of reaching a similar consensus among all States on the formulation of other more controversial substantive provisions (such as fair and equitable treatment or indirect expropriation) was questioned. One proposal was to start with softer instruments such as model laws, rules, guidelines, recommendations, toolboxes or checklists for IIA negotiators, and thereby progressively move towards finding common ground. One delegate suggested that UNCTAD should establish a database for States to use in order to exchange information on the issues raised.

Treaty renegotiation, treaty expiration and related challenges

40. The experts discussed the idea that while IIAs were designed as long-term instruments, they should not be static. In this context, some experts considered whether treaties not deemed to contribute to sustainable development might be terminated, unilaterally or by agreement between contracting parties. Political and economic concerns, such as reputational concerns with regard to State access to development finance and credit ratings by specialized agencies, might deter many States from terminating treaties. However, termination might not necessarily lead to reduced attractiveness, as investor concerns might be addressed through other means, for instance by strengthening domestic rule of law and improving investment facilitation. The experts discussed how to address concerns related to the continued application of treaty provisions by virtue of the survival

clause, including the option of contracting parties making a joint decision to revoke the clause before termination.

41. Other options considered included providing for different time frames of continued application, depending on the needs of different sectors, for example a longer application for infrastructure or mining projects. The renegotiation of IIAs, that is, the replacement of old treaties with new treaties, allowing contracting parties to coordinate reform, was also considered. The experts noted that renegotiation could pose serious capacity problems in some countries, however, and would depend on mutual consent. A few experts considered that renegotiation was not the most effective method of addressing cross-cutting issues in IIAs. In this regard, other experts noted the possibility of seeking multilateral opt-in approaches to issues where consensus might be emerging (e.g. one suggestion was indirect expropriation) and the UNCITRAL Convention on Transparency was referred to as an example of such an approach.

Role of treaty interpretation in international investment agreement reform

42. The experts discussed whether States could or should provide guidance to arbitral tribunals through authentic interpretations of IIA provisions and how this might be achieved. The experts noted that efforts could focus on the most controversial clauses common to most treaties and to which tribunals had attributed contradictory meanings, such as most-favoured nation treatment, fair and equitable treatment and umbrella clauses. Various ways by which States could engage in interpretation were considered, such as a bilateral approach whereby a State would propose to treaty partners the issuance of interpretative statements for specific bilateral investment treaties. Submissions by non-disputing contracting parties in ISDS proceedings could also assist in interpretation. For instance, it was common practice for all three parties to the North American Free Trade Agreement to submit opinions on legal issues raised in ISDS cases brought under the agreement. Some experts stressed that the timing of interpretation notes, that is, whether a note was issued before, during or after a dispute, could raise concerns with regard to fairness.

43. The experts also discussed a multilateral approach, for example modelled on the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, which provided an opt-in mechanism for States. The practice of the United Nations and the Organization for Economic Cooperation and Development of issuing commentaries to their respective model double-taxation treaties was noted as helpful. However, the experts noted that the differences in wording found in IIAs would pose significant challenges to a multilateral response. The experts noted that more recent IIAs had tended to explicitly include various options that enhanced the interpretative powers of States.

5. Investment dispute settlement

Appeals facility

44. The experts discussed the notion of an appeals mechanism in IIAs and considered the idea that having a right to appeal was a due-process guarantee that disputing parties should have, which existed in other international litigation mechanisms. At the same time, the experts noted that establishing an appeals facility was a very complex issue in the context of the IIA regime, and that the prospect would depend on whether the system would remain predominantly bilateral or whether its growing regional and multilateral dimensions would materialize. Another relevant factor was whether the system would remain investor–State oriented or shift towards State–State dispute settlement.

45. A single, standing appeals mechanism might be preferable to multiple ad hoc mechanisms, as it would better address the current problems of lack of legal consistency

and predictability in arbitral decisions. The WTO was referred to as a possible model, although the experts acknowledged that the Appellate Body oversaw a set of multilateral treaties (the WTO agreements) rather than thousands of differently worded IIAs. An alternative suggestion was to use the International Centre for Settlement of Investment Disputes (ICSID) as a forum, although the experts noted that the UNCITRAL Arbitration Rules and other arbitration rules were also frequently used, and were at times the only rules available under an IIA, for instance if a country was not a member of the ICSID.

46. One expert noted that in light of differences in the language of IIAs, an appeals facility would be unlikely to fully resolve problems related to consistency and predictability but would considerably enhance the legitimacy of the ISDS system. Two delegates stressed that creation of an appellate mechanism would be difficult to pursue separately from substantive IIA reform because, among other reasons, amendments to existing treaties might be required. Although short-term solutions were difficult to find, an incremental bottom-up approach, including an opt-in mechanism similar to that in the UNCITRAL Convention on Transparency, might be considered. More detailed analysis of the ways in which an appeals facility might be established, the potential scope of appellate review and other specific issues for consideration in this context might be useful.

International investment court

47. The experts discussed legitimacy concerns raised by the current system of ad hoc arbitration. Issues deserving attention in this regard included a perceived lack of independence and impartiality of arbitrators, the high cost of investment arbitration proceedings and questions related to the competence of ad hoc arbitral tribunals when public interest issues were at stake. The experts considered whether a permanent international investment court might address such issues, including by providing access to stakeholders other than investors and States, for example communities affected by investment projects.

48. With regard to the potential disadvantages of such a court, the experts noted that it might raise sovereignty concerns among States, involve costs for a broader range of countries and contribute to the politicization of disputes. Some experts noted that the debate could divert attention from more practical solutions for investment dispute settlement and that the need for a permanent court might be less urgent if countries improved their domestic legal systems and increased opportunities for mediation or alternative dispute resolution mechanisms.

49. Acknowledging that considerable political will was required for the creation of a court, the experts examined whether it would be feasible to set up a court in a plurilateral context based on the initiative of a selected group of countries, with the possibility of other countries joining at a later stage. A few experts considered multilateral initiatives more promising in ensuring the legitimacy and representativeness of a permanent institution. One delegate suggested linking this discussion to the one on an appeals facility, since an appeals process could be made available under an investment court.

50. Several delegates encouraged more research to be conducted in this field by UNCTAD and other organizations, including on questions such as a prospective court's relationship to investment arbitration and State–State procedures and its potential jurisdiction and remedies. Future research could also consider the possibility of using enforcement mechanisms under the ICSID or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and could analyse best practices and lessons learned from the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO, the International Court of Justice and other international and regional courts and tribunals.

Investor access to investor–State dispute settlement (e.g. defining the scope of the subject matter and the exhaustion of domestic remedies)

51. Different views were expressed with regard to investor access to ISDS and the need for reform. One view, that there was no need to continue providing investors with access to ISDS, was based on concerns with regard to the legitimacy of ISDS and the fact that it afforded foreign investors rights that domestic investors did not have. The purpose of ISDS in treaties between States with developed legal systems was also questioned by some experts. In addition, including ISDS in treaties between developed and developing countries could result in new inequalities. In this context, a few delegates emphasized that Governments should focus instead on fostering the domestic rule of law and improving the quality of national judiciary systems and institutions. At a minimum, there should be a rule for the pursuance of local remedies first, either for a certain minimum amount of time or until all local remedies had been exhausted.

52. The other view emphasized the difficulties that investors faced when investing abroad, which might be linked to a power imbalance between investors and Governments and the capacity of the latter to amend domestic law unilaterally or grant benefits only to domestic investors. From a historical point of view, IIAs had been a result of the internationalization of rule-of-law issues with which investors were concerned. Current IIAs had evolved in many respects, reflecting the increased experience of States with treaty negotiations and lessons learned from investment arbitration.

53. The experts considered a proposal to improve existing ISDS mechanisms. Suggested reforms included increasing the transparency of ISDS proceedings, adding a code of conduct for arbitrators in treaties, setting up an appeals mechanism, addressing collective action challenges for smaller investors, adding a mechanism for the early dismissal of frivolous claims, having fork-in-the-road provisions to avoid double recovery, clarifying rules on the calculation of interest and allocation of costs and enhancing provisions on the right of host States to regulate. Setting up distinct mechanisms for dealing with specific types of claims, for example based on the subject matter or sector or for individual regulations, was a useful practice. With regard to opportunities presented by cooling-off periods, States should use such periods to engage in serious negotiations at the highest levels of government, with the aim of finding a solution at an early stage. A concern was expressed with regard to umbrella clauses that had allegedly been used by some investors to circumvent dispute resolution clauses in contracts. Some delegates proposed that UNCTAD should undertake in-depth work on remedies and compensation.

Transparency

54. The experts discussed transparency in arbitration proceedings as a means to expose abuses of the system and to respond to public interest in cases. This issue needed to be addressed carefully, inter alia, to prevent the harassment of witnesses and protect confidential business information. Concerns were raised regarding additional costs related to enhancing transparency. The work of UNCITRAL in this field was discussed, including as an example of a coordinated multilateral solution to a specific problem. At its forty-first session, the Commission had agreed that the topic of transparency was important, and it had taken only a few years to devise the UNCITRAL Rules on Transparency and an appropriate opt-in mechanism that would enable the application of the rules to disputes under existing IIAs. In addition, States could refer to the Rules on Transparency in their new treaties, as already done in some cases.

55. Many experts considered that it would be important in the future to advocate the advantages of increased transparency for investors, and home States could play a role in this endeavour. The experts highlighted the need for cooperation with the ICSID and other arbitration institutions, as well as the need to enable civil society to play an increased role

in monitoring relevant developments. Other suggestions included piloting projects on transparency with specific countries, restricting the enforcement of arbitral awards that were not publicly available and using adherence to the UNCITRAL Rules on Transparency as a condition for loans from international financial institutions. Finally, the experts acknowledged that transparency should also apply to settlements, including those agreed through mediation procedures. The broader issue of transparency in the negotiation and renegotiation of treaties was also discussed.

6. Conclusions and recommendations

56. During the final plenary session, the experts expressed their appreciation to UNCTAD for the organization of the expert meeting. Many experts stated that the innovative format, involving breakout sessions, and the interactive nature and involvement of a broad range of non-governmental stakeholders from the private sector, civil society and academia had contributed to the meeting being representative, informative and productive.

57. Some experts reiterated the need for coordinated action to pursue effective and comprehensive reform of the IIA regime. They stressed that, individually, countries would be able to undertake only parts of the needed IIA reform. National solutions were useful but, by definition, could not be comprehensive. Only a joint, multilateral effort could be truly effective. In this context, some experts drew attention to new multilateral initiatives in related fields such as taxation.

58. Other proposals to support the individual efforts of countries to improve the IIA regime included the establishment of non-binding guidelines to which countries could opt in, a checklist for IIA negotiations, a centre for legal assistance for developing and least developed countries, a code of conduct for arbitrators and promotion of early conflict management mechanisms, as well as continued efforts to revise the model IIAs of States. Improving domestic legal systems and institutions would remain paramount.

59. Several experts highlighted the role of UNCTAD as an incubator, coordinator of ideas and inclusive multilateral platform for sharing experiences on issues related to IIA reform. Some delegates called on the secretariat to take a more active role and to develop an action-oriented roadmap for IIA reform that would take into account the interests of all stakeholders. In addition, some delegates stressed the need for continued technical assistance. Finally, some experts noted the need for additional fact-finding on the issues raised and for follow-up discussions, including through the establishment of working groups.

60. In his closing remarks, the Director of the Division on Investment and Enterprise noted that the expert meeting had achieved its hoped-for results and stressed that sustainable development should be the overarching goal of reform of the IIA regime, that its systemic deficiencies should be the focus of action and that synergies with other public policymaking processes should be ensured. The Director called on future action to be collaborative in spirit, involving the collective wisdom of all stakeholders and oriented towards finding concrete solutions. Finally, the Director underlined the need for further multilateral, multi-stakeholder and multidisciplinary engagement on the matter at hand.

II. Organizational matters

A. Election of officers

(Agenda item 1)

61. At its opening plenary, on 25 February 2015, the expert meeting elected Mr. Ahmed Shehabeldin (Egypt) as its Chair and Mr. Colin Brown (European Union) as its Vice-Chair-cum-Rapporteur.

B. Adoption of the agenda and organization of work

(Agenda item 2)

62. Also at its opening plenary, the expert meeting adopted the provisional agenda for the meeting (contained in document TD/B/C.II/EM.4/1). The agenda was thus as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. Transformation of the international investment agreement regime
4. Adoption of the report of the meeting

C. Outcome of the meeting

63. At its closing plenary, on 27 February 2015, the expert meeting agreed that the Chair should summarize the discussions.

D. Adoption of the report of the meeting

(Agenda item 4)

64. Also at its closing plenary, the expert meeting authorized the Vice-Chair-cum-Rapporteur, under the authority of the Chair, to finalize the report after the conclusion of the meeting.

Annex 1

Attendance[2]

1. Representatives from the following States members of UNCTAD attended the expert meeting:

Afghanistan
Albania
Algeria
Angola
Argentina
Austria
Bangladesh
Barbados
Belarus
Belgium
Benin
Bhutan
Bolivia (Plurinational State of)
Bosnia and Herzegovina
Brazil
Cameroon
Canada
China
Colombia
Costa Rica
Croatia
Cuba
Czech Republic
Democratic Republic of the Congo
Ecuador
Egypt
Ethiopia
France
Gambia
Georgia
Germany
Guatemala
Guinea
Haiti
India
Indonesia
Iran (Islamic Republic of)
Iraq
Israel
Italy
Jordan
Kazakhstan
Kenya
Lao People's Democratic Republic
Latvia
Libya
Madagascar
Malaysia
Mali
Malta
Mexico
Mongolia
Montenegro
Morocco
Mozambique
Myanmar
Namibia
Nepal
Netherlands
Nicaragua
Nigeria
Norway
Oman
Pakistan
Panama
Peru
Philippines
Poland
Portugal
Qatar
Republic of Moldova
Romania
Saudi Arabia
Serbia
Slovakia
South Africa
Spain
Sri Lanka
Suriname
Sweden
Switzerland
Thailand
Trinidad and Tobago
Tunisia
Turkey
United Arab Emirates
United States of America
Yemen
Zimbabwe

[2] This attendance list contains registered participants. For the list of participants, see TD/B/C.II/EM.4/INF.1.

2. The following intergovernmental organizations were represented at the expert meeting:

Common Market for Eastern and Southern Africa
European Free Trade Association
European Union
Organization for Economic Cooperation and Development
Organisation internationale de la francophonie
South Centre
West African Economic and Monetary Union

3. The following United Nations organs, bodies and programmes were represented at the expert meeting:

Economic Commission for Africa
Office of the High Commissioner for Human Rights
United Nations Commission on International Trade Law
United Nations Environment Programme

4. The following specialized agencies and related organizations were represented at the expert meeting:

World Bank Group
World Trade Organization

5. The following non-governmental organizations were represented at the expert meeting:

General category
ActionAid
Consumer Unity and Trust Society International
International Centre for Trade and Sustainable Development
International Chamber of Commerce
International Institute for Sustainable Development
International Trade Union Confederation
Public Services International
Third World Network

Special category
Center of Concern

Annex 2

[English and French only]

Other attendees

1. The following other organizations were represented at the expert meeting:

Africa 21
Austrian Federal Economic Chamber
British Institute of International and Comparative Law
Centre for International Governance Innovation
Centre for Socio-Eco-Nomic Development
Columbia Center on Sustainable Investment
Ecologic Institute
Energy Charter Secretariat
Environmental Data Services Europe
Environmental Data Services United Kingdom of Great Britain and Northern Ireland
European Economic and Social Committee
Friedrich Ebert Foundation
Geneva Consensus Foundation
Institut Euro-Africain de Droit Economique
International Institute for Environment and Development
Oeconomicae Corporate Sustainability Research Institute Switzerland
People's Health Movement – Safe Observer International
ToHelp
Traidcraft
United Planet
World Economic Forum
WTO Affairs Consultation Centre, Shanghai, China

2. The following academic institutions were represented at the expert meeting:

Asser Institute, The Hague, Netherlands
Bocconi University, Milan, Italy
Brunel Law School, Brunel University London
Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, United Kingdom
Cologne Business School, Germany
Dauch College of Business and Economics, Ashland University, United States
Faculty of Law, University of New South Wales, Australia
Free University (Vrije Universiteit) Brussels
Global Economic Governance Programme, University of Oxford, United Kingdom
Graduate Institute of International and Development Studies, Geneva, Switzerland
HTW University of Applied Sciences, Berlin
Institute of Malaysian and International Studies, National University of Malaysia

Institute of World Economy and Politics, Chinese Academy of Social Sciences
International Economic Law and Policy, Faculty of Law, University of Barcelona, Spain
King's College London
Korea University Law School, Republic of Korea
London School of Economics and Political Science
Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law
Moscow State Institute of International Relations
National University of Singapore
Paris II Panthéon-Assas University
Queen Mary University of London
School of Law, University of St. Thomas, Saint Paul, United States
School of Oriental and African Studies, University of London
The Hague University of Applied Sciences, Netherlands
University College London
University of Amsterdam
University of Antwerp, Belgium
University of Athens
University of Basel, Switzerland
University of Cambridge, United Kingdom
University of Fribourg, Switzerland
University of Geneva, Switzerland
University of Kiel, Germany
University of Lausanne, Switzerland
University of Leuven, Belgium
University of Liverpool, United Kingdom
University of Nice, France
University of St. Gallen, Switzerland
University of Toronto, Canada
University of Verona, Italy
Utrecht University, Netherlands
World Trade Institute, University of Bern

3. The following guest speakers attended the expert meeting:

Ms. Catalina Barberi Torres, Economist, Ministry of Trade, Industry and Tourism, Bogota
Mr. Muhammad De Gama, Director, International Trade and Investment, Department of Trade and Industry, Pretoria
Mr. Erivaldo Gomes, Deputy Subsecretary for Regional Integration and Trade, Ministry of Finance, Brasilia
Mr. Chutintorn Gongsakdi, Director General, Department of International Economic Affairs, Ministry of Foreign Affairs, Bangkok
Ms. Saloua Hsoumi, Chief, Negotiators Team, and Director, Ministry of Development, Investment and International Cooperation, Tunis
Ms. Afroza Khan, Joint Secretary, Ministry of Industries, Dhaka
Mr. Gert Kodra, First Secretary, Expert in International Investment Agreements, Ministry of Foreign Affairs, Tirana
Ms. Yongjie Li, Director, Department of Treaty and Law, Ministry of Commerce, Beijing
Ms. Brigitte Lüth, Attaché, Permanent Mission of Austria, Geneva

Ms. Champika Malalgoda, Director, Research and Policy Advocacy Department, Board of Investment, Colombo

Ms. Stormy-Annika Mildner, Head of Department, External Economic Policy, Federation of German Industries, Berlin

Mr. Manuel Monteagudo, General Counsel, Central Reserve Bank of Peru, Lima

Mr. John O'Neill, Minister and Deputy Permanent Representative, Permanent Mission of Canada, Geneva

Ms. Jasmina Roskic, Head of Department, Ministry of Trade, Tourism and Telecommunications, Belgrade

Mr. Sudhanshu Roy, Legal Adviser, International Investment Agreements, Ministry of Finance, New Delhi

Mr. Ahmed Shehabeldin, Minister Plenipotentiary and Deputy Permanent Representative, Permanent Mission of Egypt, Geneva

Mr. Lukas Siegenthaler, Head of Division, International Investment and Multinational Enterprises, State Secretariat for Economic Affairs, Bern

Mr. Renato R. De Campos Souza, Deputy Director, International Negotiations, Ministry of Development, Industry and Foreign Trade, Brasilia

Ms. Samira Sulejmanovic, Head of Unit, Bilateral Trade Relations, Ministry of Foreign Trade and Economic Relations, Sarajevo

Ms. Ishita Ganguli Tripathy, Director, Domestic Investment and International Investment Agreements, Department of Economic Affairs, Ministry of Finance, New Delhi

Mr. Marten van den Berg, Deputy Director General, Foreign Economic Relations, Ministry of Foreign Affairs, The Hague, Netherlands

Mr. Christopher S. Wilson, Deputy Chief, Permanent Mission of the United States to the World Trade Organization, Geneva

Ms. Aurelia Antonietti, Legal Counsel, International Centre for Settlement of Investment Disputes, World Bank Group, Washington, D.C.

Ms. Nathalie Bernasconi-Osterwalder, Group Director, Economic Law and Policy, International Institute for Sustainable Development, Geneva

Mr. Colin Brown, Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, Directorate General for Trade, European Union, Brussels

Ms. Jane Connors, Director, Research and Right to Development Division, Office of the High Commissioner for Human Rights, Geneva

Ms. Corinne Montineri, Legal Officer, International Trade Law Division and Secretary, Working Group II (Arbitration and Conciliation), United Nations Commission on International Trade Law, Vienna

Ms. Anca Radu, Policy Officer and Investment Negotiator, European Union, Brussels

Ms. Sanya Reid Smith, Senior Researcher and Legal Adviser, Third World Network, Geneva

Mr. Peter Sorensen, Ambassador, Head of the Permanent Delegation of the European Union to the United Nations Office and other international organizations in Geneva

Mr. Nicolas Jansen Calamita, Director, Investment Treaty Forum, and Senior Research Fellow, British Institute of International and Comparative Law, London

Mr. Lorenzo Cotula, Principal Researcher, Law and Sustainable Development, International Institute for Environment and Development, London
Ms. Anna De Luca, Professor, Bocconi University, Milan, Italy
Mr. Shaun Donnelly, Vice-President, Investment and Financial Services, United States Council for International Business, Washington, D.C.
Mr. Michael Ewing-Chow, Professor, National University of Singapore
Mr. Luis Gallegos, former Permanent Representative, Permanent Mission of Ecuador, Geneva
Ms. Lise Johnson, Head, Investment Law and Policy, Columbia Center on Sustainable Investment, United States
Mr. Federico Ortino, Reader in International Economic Law, King's College London
Mr. Jonathan Peel, Vice-President, International Relations Section, European Economic and Social Committee, Brussels
Mr. Lauge Poulsen, Lecturer in International Political Economy, University College London
Mr. Ilia Rachkov, Associate Professor, Moscow State Institute of International Relations
Ms. Luisa Santos, Director, International Affairs, BusinessEurope, Brussels
Mr. Stephan Schill, Professor, University of Amsterdam
Ms. Krista Nadakavukaren Schefer, Professor, University of Basel, Switzerland
Ms. Rebecca Varghese-Buchholz, Policy Adviser, Trade and Investment, Traidcraft, Gateshead, United Kingdom